No. 14-232

IN THE

Supreme Court of the United States

WESLEY W. HARRIS, *et al.*,

Appellants,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT OF ARIZONA

OPPOSITION TO MOTION TO DISMISS OR AFFIRM

MARK F. (THOR) HEARNE, II
Counsel of Record
STEPHEN S. DAVIS
ARENT FOX LLP
1717 K Street, NW
Washington, D.C. 20036
(202) 857-6000
thor@arentfox.com

STEPHEN G. LARSON
ROBERT C. O'BRIEN
STEVEN A. HASKINS
ARENT FOX LLP
555 West Fifth Street,
48th Floor
Los Angeles, CA 90013
(213) 629-7400

DAVID J. CANTELME
CANTELME & BROWN PLC
3003 N. Central Avenue
Suite 600
Phoenix, AZ 85012
(602) 200-0104

MICHAEL T. LIBURDI
SNELL & WILMER LLP
One Arizona Center
400 E. Van Buren Street
Phoenix, AZ 85004
(602) 382-6000

(Additional Counsel listed on signature page)

December 2, 2014

256438

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.	i
TABLE OF CITED AUTHORITIES	ii
INTRODUCTION	.1
I. Believing the Justice Department would more likely preclear its redistricting scheme does not justify unequal legislative districts that violate the Equal Protection Clause's guarantee of one-person, one-vote.	.5
II. The unequal districts were not the result of traditional, race-neutral districting criteria.	.8
III. The Equal Protection Clause prohibits deviations from population equality to accomplish an illegitimate objective.	.10
CONCLUSION	.13

TABLE OF CITED AUTHORITIES

Page

CASES

Abrams v. Johnson,
521 U.S. 74 (1997). .5

Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n,
No. 13-1314 (Order of October 2, 2014) 1, 2, 13

Bush v. Vera,
517 U.S. 952 (1996) .10

Gaffney v. Cummings,
412 U.S. 735 (1973). . .8, 9

Growe v. Emison,
507 U.S. 25 (1993). .13

Harper v. Va. Dep't of Taxation,
509 U.S. 86 (1993). .6

Karcher v. Daggett,
462 U.S. 725 (1983). .9

Kirkpatrick v. Preisler,
394 U.S. 526 (1969). .9

Larios v. Cox,
300 F. Supp. 2d 1320 (N.D. Ga. 2004) .12

Cited Authorities

	Page
League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006)	.5, 9, 11, 13
McCain v. Lybrand, 465 U.S. 236 (1984).	.6
Miller v. Johnson, 515 U.S. 900 (1995). .	.3, 8
Reynolds v. Sims, 377 U.S. 533 (1964).	.1, 4
Roman v. Sincock, 377 U.S. 695 (1964).	.1
Shelby County v. Holder, 133 S.Ct. 2612 (2013)	*passim*
South Carolina v. Katzenbach, 383 U.S. 301 (1966).	7, 8
United States v. Bd. of Comm'rs of Sheffield, Ala., 435 U.S. 110 (1977).	.6, 7
Vieth v. Jubelirer, 541 U.S. 267 (2004).	.11, 12

STATUTES AND OTHER AUTHORITIES

Voting Rights Act, §4	*passim*
Voting Rights Act, §5	*passim*

INTRODUCTION

This is the second of two cases arising from the Arizona Independent Redistricting Commission's (IRC) redrawing Arizona's congressional and state house and senate districts. This Court has already noted jurisdiction reaching the merits of the first case. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, No. 13-1314 (Order of October 2, 2014).

Arizona State Legislature asks whether it is constitutional under the Elections Clause to divest Arizona's state legislature of any role apportioning congressional districts and to vest redistricting in an independent commission not accountable to the legislature.

This case asks whether the IRC's reapportionment of Arizona's state legislature is constitutional when the IRC drew legislative districts that violate this Court's one-person, one-vote principle in *Reynolds v. Sims*, 377 U.S. 533, 577 (1964), and *Roman v. Sincock*, 377 U.S. 695, 710 (1964). The IRC was capable of creating legislative districts with equal population, as it did when it created congressional districts with no population deviation.[1] Yet, when it came to state legislative districts, the IRC intentionally and systematically over-populated some Republican districts and under-populated Democrat

1. *See* IRC website, 2012 congressional district population data table at: <http://azredistricting.org/Maps/Final-Maps/Congressional/Reports/Final%20Congressional%20Districts%20-%20Population%20Data%20Table.pdf> (last visited November 29, 2014); *see also id.*, 2001 congressional district population data table at: <http://azredistricting.org/2001/Final/congfinal.pdf> (last visited November 29, 2014).

districts. App. 209a. The effect of the IRC's plan was to inflate the influence of Democrat voters and dilute the influence of Republican voters.

The district court found the IRC did this for partisan advantage and because the IRC hoped the Justice Department would more likely preclear this plan under the Voting Rights Act. App. 36a, 107a.

Proponents of the measure creating the IRC claimed divesting Arizona's legislature from the redistricting process and vesting sole reapportionment authority in the IRC would remove partisan interests from the redistricting process. *See* Op. Br. of *Ariz. State Legislature*, pp. 2-4 and authorities cited therein.

This case demonstrates the exact opposite occurred. By delegating redistricting to the IRC—a five-member body without any political accountability—Arizona's legislative districts were intentionally drawn to achieve partisan advantage for the Democrat party. Out of thirty districts, "the 18 with population deviation greater than ±2% from ideal population correlate *perfectly* with Democrat Party advantage." App. 108a (emphasis added). The total population deviation (a measure of how unequal these district are) is close to 9%. This is an almost three times greater deviation than Arizona's prior legislative districts.[2]

---

2. *See* IRC website, adopted legislative redistricting plan of April 12, 2004 showing total deviation of 3.12%, at: <http://azredistricting.org/2001/2004newlegtests/batch7/April%2012%20Adopted%20stats.pdf> (last visited Nov. 29, 2014).

The IRC's unequal legislative districts deny equal weight to more than 70,000 Arizona citizens' votes. App. 112a-113a; *see also* App. 209a; Jurisdictional Statement, pp. 8-10. As the legislative map and charts in Judge Wake's dissent demonstrate, the IRC adopted an unequally-apportioned scheme to redistrict Arizona's legislature for partisan benefit.

The IRC does not dispute the almost 9% population deviation in these unequal districts. Instead, it responds by claiming this is a "minor" or "insignificant" deviation from the one-person, one-vote standard the IRC was required to make to obtain Justice Department preclearance. The IRC asks this Court to uphold its intentionally unequal legislative districts even though this Court declared the formula upon which preclearance is triggered to be unconstitutional. *See Shelby County v. Holder*, 133 S.Ct. 2612 (2013).

The problem is that, even if true, and even if §5 of the Voting Rights Act were still enforceable, obtaining Justice Department preclearance does not justify violating the one-person, one-vote constitutional mandate. *See Miller v. Johnson*, 515 U.S. 900, 927 (1995). The Voting Rights Act does not justify drawing systemically-unequal districts as the IRC did. As Judge Wake noted, even if one once believed obtaining Justice Department preclearance was a legitimate reason to violate the one-person, one-vote principle it no longer justified unequal districts after *Shelby County*. App. 124a-128a.

Finally, the IRC asks this Court to uphold its unequal legislative districts until the next reapportionment almost a decade from now. Doing so means more than 70,000

Arizona citizens are denied an equally-weighted vote for their state representative and state senator in *every* election over the next decade. If the one-person, one-vote principle means anything, it means we can do better than what the IRC did. It means the IRC's unequal legislative districts, established for the purpose of achieving, at least in part, a partisan advantage, are not constitutional and must be redrawn to conform to the one-person, one-vote principle.

The IRC's reapportionment systematically under-populated Arizona's majority-minority districts. The ten most under-populated districts also have the highest minority percentages. The IRC admits that this was intentional. But neither racial, ethnic, nor partisan motivations justify the IRC's unequal districts.

Even if the IRC thought systematic inequality was necessary to win the Justice Department's favor, this does not change the fundamental principle that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Reynolds*, 377 U.S. at 568. And, the IRC's misguided effort to obtain preclearance by under-populating minority districts unquestionably implicates racial and ethnic concerns and, thereby, raises "serious constitutional questions."[3] *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 446 (2006); *see also* App. 31a–34a.

3. *See Abrams v. Johnson*, 521 U.S. 74, 91 (1997).

I. Believing the Justice Department would more likely preclear its redistricting scheme does not justify unequal legislative districts that violate the Equal Protection Clause's guarantee of one-person, one-vote.

The IRC defends its unequal districts by arguing §5 required the IRC to draw these unequal districts. Mot. to Affirm, pp. 21-22. This is wrong for three reasons. **First,** Congress cannot compel by statute a state to violate the Fourteenth Amendment guarantee of Equal Protection. Thus, §5, even if it applies, does not compel unequal districts. **Second,** §5 is no longer a justification because this Court declared the coverage formula that brought Arizona within §5 unconstitutional. *Shelby County*, 133 S.Ct. at 2631. Consequently the IRC's desire to comply with §5 is not a legitimate reason to violate the one-person, one-vote principle. **Third**, preclearance did not require the IRC to draw unequal districts. *See* Jurisdictional Statement, p. 33-36, especially as to District 8.

The IRC says *Shelby County* is not relevant because *Shelby County* was decided after it finished redistricting Arizona's state legislative districts. Mot. to Affirm, pp. 24-27. The IRC argues *Shelby County* does not retroactively negate its supposed reliance on §5. *But see Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.").

The IRC fails to appreciate that *Shelby County* changed Arizona's relationship with the federal government. After *Shelby County*, Arizona was no longer subjected to §5's intrusive preclearance regime. This is precisely the point Judge Wake makes in his dissent. App. 122a-128a. The Voting Rights Act was created to address an "extraordinary problem." *Shelby County*, 133 S.Ct. at 2618; *see also McCain v. Lybrand*, 465 U.S. 236, 244 (1984) ("The 'preclearance' requirement mandated by §5 of the Act is perhaps the most stringent of these remedies, and certainly the most extraordinary."); *United States v. Bd. of Comm'rs of Sheffield, Ala.*, 435 U.S. 110, 141 (1977) ("This so-called 'preclearance' requirement is one of the most extraordinary remedial provisions in an Act known for its broad remedies.") (Powell, J., concurring).

Section 5's preclearance requirement was "a drastic departure from basic principles of federalism," and the now-unconstitutional §4 was an "equally dramatic departure from the principle that all States enjoy equal sovereignty." *Shelby County*, 133 S.Ct. at 2618. These legislative remedies were implemented under "exceptional conditions" equal to the "entrenched racial discrimination" the Voting Rights Act was designed to combat. *Id.* (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966)). Thus, the Voting Rights Act's "departures" from federalism and state sovereignty were "justified" only when necessary to break down invidious racial barriers to minority voting. *Id.* at 2625.

Sections 4 and 5 are inextricably intertwined. Section 4's formula was "the means of linking the exercise of the unprecedented authority with the problem that warranted it." *Id.*; *see also Bd. of Comm'rs*, 435 U.S. at 141 (Powell,

J., concurring) ("Section 5 provides that whenever a State or political subdivision, designated pursuant to §4, seeks to change a voting practice, it must obtain clearance for that change from either the United States District Court for the District of Columbia or the Attorney General of the United States.").

It is, thus, richly ironic the IRC invokes concepts of state sovereignty and federalism in defense of its unequal reapportionment scheme. Arizona suborning its internal redistricting process to §5 of the Voting Rights Act is *inimical* to federalism concerns. As the decisions of this Court note, §5 of the Voting Rights Act infringes the sovereignty of those states to which it applies. Such an intrusion can only be countenanced on the basis of invidious discrimination of the type once identified by §4's coverage formula. Because present conditions no longer justify such an intrusion, the district court was wrong to uphold the IRC's unequal reapportionment on this basis.

As noted in our opening brief, the IRC manipulated the population in districts 8, 24, and 26 for the supposed purpose of obtaining §5 preclearance. But unequally populating these districts was not "reasonably necessary" to comply with §5 "under a constitutional reading and application" of the Voting Rights Act. Jurisdictional Statement, pp. 31-41. Even if done to comply with how the IRC *thought* the Justice Department would apply the Voting Rights Act, the reapportionment "still must 'consist with the letter and spirit of the constitution.'" *Miller*, 515 U.S. at 927 (quoting *Katzenbach*, 383 U.S. at 326).

Here, the number of citizen voting-age Hispanics in districts 8, 24, and 26 were such that the IRC's claim that

these districts were so-called ability-to-elect districts is simply not credible. *See* Jurisdictional Statement, pp. 35-36. Nothing in the record supports the IRC's contention that systematic population disparities were "reasonably necessary" to achieve §5 preclearance.

The IRC claims it would have been "forced to choose between compromising its other goals or risking non-compliance with federal law, all in service of avoiding 'insignificant population variations.'" Mot. to Affirm, p. 30 (quoting *Gaffney v. Cummings*, 412 U.S. 735, 748 (1973)).

This is a false choice. The IRC had alternative districting plans that avoided any retrogression and did so with equally (or very close to equally) populated districts. These alternative plans also satisfied traditional race-neutral redistricting criteria such as respecting established geographic boundaries.

II. The unequal districts were not the result of traditional, race-neutral districting criteria.

We agree the Equal Protection Clause affords some degree of minor deviation from strict mathematical equality when necessary to accommodate traditional race-neutral redistricting criteria. States may draw districts with minor population disparities so long as those districts will not "deprive any person of fair and effective representation in his state legislature." *Gaffney*, 412 U.S. at 749.

But that is not what happened here.

This Court described the following "unchallenged premise" in redistricting cases: "[P]opulation variances

in legislative districts are tolerated only if they 'are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown.'" *Perry*, 548 U.S. at 421.[4] This Court's jurisprudence has been quite clear: When using racial and ethnic criteria to draw legislative districts, the state cannot violate traditional race-neutral redistricting criteria without triggering strict scrutiny.

Justice O'Connor explained:

> *[S]o long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy*, States may intentionally create majority minority districts, and may otherwise take race into consideration without coming under strict scrutiny.
>
> *Bush v. Vera*, 517 U.S. 952, 993 (1996) (O'Connor, J., concurring) (emphasis added).

The IRC-drawn districts were not unequally drawn to accommodate traditional redistricting criteria such as compactness and geographic boundaries. Rather, these unequal districts were the intended result of a desire to achieve a race-based, partisan outcome.

---

4. Citing *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969)).

III. The Equal Protection Clause prohibits deviations from population equality to accomplish an illegitimate objective.

The district court offered only two justifications for the IRC's unequal districts: partisan advantage and a perceived need to gain Justice Department preclearance. We show above (and in the Jurisdictional Statement) that it was not necessary, as a matter of fact or law, to have unequal districts to obtain Justice Department preclearance. This is so even if preclearance under §5 was still a valid consideration after *Shelby County*.

We are left with the IRC's desire to achieve partisan advantage as the only remaining justification explaining why it unequally apportioned Arizona's legislative districts. The district court correctly assumed partisan advantage was not a legitimate objective. App. 6a, 62a, 63a n.10, 79a.

We recognize

> In *Davis v. Bandemer*, the Court held that an equal protection challenge to a political gerrymander presents a justiciable case or controversy, but there was disagreement over what substantive standard to apply. That disagreement persists. A plurality of the Court in *Vieth*[5] would have held such challenges to be nonjusticiable political questions, but a majority declined to do so.

Perry, 548 U.S. at 413-14 (citations omitted).

5. *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004).

In *Perry*, this Court continued, holding, "[w]e do not revisit the justiciability holding but do proceed to examine whether appellants' claims offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution." *Id.* at 414.

The IRC claims this case is like *Vieth*. The IRC is wrong. There are significant differences between this case and cases like *Vieth* in which this Court has suggested a healthy skepticism for leaping into the "political thicket."

First, after *Shelby County*, partisan advantage is the IRC's *only* possible justification for adopting unequal legislative districts. The district court did not find that any traditional districting considerations—such as geographic boundaries and compactness—required the IRC's unequal districts.

Second, the IRC intentionally drew unequal districts with a population deviation of close to 9%. This is not like *Vieth*, involving a challenge to districts with *zero-population deviation*. Thus, in *Vieth*, voters went to the polling booths with equally weighted votes. That did not happen in Arizona, where the IRC's redistricting scheme allows voters in Hispanic-plurality districts to wield significantly more political influence than those in non-Hispanic-White-plurality districts. The IRC could have—even while seeking partisan objectives—drawn equally-populated districts. After all, the IRC drew Arizona's congressional districts with zero-population deviation.

This case does *not* present the question of whether partisan gerrymandered districts of *equal population*

are justiciable and constitutional. Rather, this case asks whether it is constitutional to create *unequal districts* for the purpose of achieving a partisan advantage and not to satisfy traditional, race-neutral districting objectives.

The *Larios* opinion, which this Court summarily affirmed, noted the important difference between political gerrymandering (when districts are otherwise equal) and drawing unequal districts that violate the one-person, one-vote. *See Larios v. Cox*, 300 F. Supp. 2d 1320, 1351-52 (N.D. Ga. 2004).

Individual Arizona voters who have been unequally treated are bringing this challenge under the one-person, one-vote principle and ask this Court to vindicate their right to equal protection. This case is *not* a challenge by a *political party or group* claiming the IRC's redistricting scheme makes it more difficult to elect representatives of its choice in certain districts.

Finally, in *Perry*, Justice Kennedy noted the Constitution "leaves with the States primary responsibility for apportionment of their federal congressional... districts." 548 U.S. at 414 (quoting *Growe v. Emison*, 507 U.S. 25, 34 (1993)). But as the *Arizona State Legislature* challenge demonstrates, Arizona's legislative districts were *not* drawn by the Arizona state legislature. They were drawn by the IRC, a five-member commission independent of the legislature. The constitutional deference traditionally accorded a state legislature is not applicable where (as here) the redistricting was not done by the state legislature.

CONCLUSION

We ask this court to note jurisdiction, to reverse the district court, and to remand this matter instructing that Arizona's state legislative districts be reapportioned consistent with the one-person, one-vote standard. Alternatively, we ask this Court to stay this appeal pending its decision in *Arizona State Legislature* and, in light of that decision, vacate the decision of the district court and remand this case to the district court to reconsider its decision in light of this Court's decision in *Arizona State Legislature.*

Respectfully submitted,

MARK F. (THOR) HEARNE, II
Counsel of Record
STEPHEN S. DAVIS
ARENT FOX LLP
1717 K Street, NW
Washington, D.C. 20036
(202) 857-6000
thor@arentfox.com

STEPHEN G. LARSON
ROBERT C. O'BRIEN
STEVEN A. HASKINS
ARENT FOX LLP
555 West Fifth Street,
48th Floor
Los Angeles, CA 90013
(213) 629-7400

DAVID J. CANTELME
CANTELME & BROWN PLC
3003 N. Central Avenue
Suite 600
Phoenix, AZ 85012
(602) 200-0104

E. MARSHALL BRADEN
BAKER HOSTETLER LLP
1050 Connecticut Ave., N.W.
Suite 1100
Washington, D.C. 20036
(202) 861-1500

MICHAEL T. LIBURDI
SNELL & WILMER LLP
One Arizona Center
400 E. Van Buren Street
Phoenix, Arizona 85004
(602) 382-6000

JASON TORCHINSKY
SHAWN SHEEHY
HOLTZMAN VOGEL JOSEFIAK PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20186
(540) 341-8808

Counsel of Appellants